88-1454

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

****

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

****

VERNON HOWARD BARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

****

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****

QUESTIONS PRESENTED

1. Does a conflict exist between the Second Circuit in its opinion of Archer v. United States, 486 F.2d 670, 2nd Cir. (1973) and the Eleventh Circuit in its recent ruling of United States v. Petit, 841 F.2d 1546 (11th Cir. 1988)?

2. Did Congress intend for criminal prosecutions to be conducted under Title 18, United States Code, Section 875(c), when police officers suggest that interstate telephone calls be made by "alleged victims" to a putative defendant who is located across state lines, the "alleged victims" are told to induce the putative defendant into conversations which will then be used as "harassing phone calls", and the "alleged victims" are told by the police that they have nothing to fear or be concerned about?

3. Does the failure of an appellate court to issue a written opinion result in a due process violation and the deprivation of that individual to seek further certiorari review?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. _____

VERNON HOWARD BARNES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VERNON HOWARD BARNES, PETITIONER, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) was a per curiam opinion and was not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on September 15, 1988. A Petition for Rehearing En Banc was denied on January 3, 1989 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be deprived of life, liberty, or property, without due process of law...

2. Section 875(c) of the United States Code Annotated provides, in relevant part:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

A federal grand jury returned a three-count indictment charging Vernon Howard Barnes with the offense of transmitting interstate telephone communication containing a threat to injure the person of named victims [Title 18, United States Code, Section 875(c)]. The indictment charged that Barnes made three telephone calls to the sisters of his ex-lover Richard Shipman. The government's theory was that the telephone calls, even though initiated by law enforcement personnel here in Georgia while Barnes was in Florida, constituted the transmission of prohibited telephone communications.

Appellant timely filed pre-trial motions. Included in those motions was a motion to dismiss the indictment on the basis that the interstate element of the

offense [which formed the basis of federal jurisdiction] was manufactured by law enforcement personnel. The magistrate recommended that the indictment be dismissed. A superseding indictment was rendered by the grand jury. The motion to dismiss the indictment based upon federally created jurisdiction was renewed and an evidentiary hearing was conducted by the magistrate. Following that hearing, the magistrate again recommended that the counts appearing in the original indictment [Counts One, Four and Five of the superseding indictment] should be dismissed. The district court filed an order denying the motion to dismiss. Petitioner proceeded to trial.

At trial, Petitioner presented the affirmative defense that within the meaning of United States v. Bozeman, 495 F.2d 508

(5th Cir. 1974), the telephone conversations in question could not legally be construed as bringing about fear or constituting threats in the recipients due to the close, familial, personal knowledge and personal relationship Petitioner had with his ex-lover's sisters. The jury acquitted Petitioner of the offenses alleged in Counts Two, Three and Four but convicted him of Counts One and Five.

Although Petitioner offered an alternative sentencing plan, including two full years of community service through the United Way program of Broward County, Florida, it was the order of the district court that Barnes be committed to the custody of the Attorney General for a period of five years on Count One to be followed by a five-year suspended sentence on Count Five with the special condition that Barnes serve

twenty-four months under house arrest for the County Five conviction. In addition, Petitioner was ordered to perform forty hours of community service per week for a two-year period. A motion for reduction of sentence was granted on February 3, 1989. Petitioner must now serve six months incarceration on Count One. Count Five remains unchanged, but the trial court has a supplemental motion for reduction as to Count Five under advisement at this time.

Petitioner's appeal was denied in a per curiam order of the Eleventh Circuit Court of Appeals. A petition for en banc consideration was denied on January 3, 1989.

REASONS FOR GRANTING THE WRIT

CONFLICT BETWEEN THE CIRCUITS ON THE ISSUE OF FEDERALLY CREATED JURISDICTION

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, Petitioner

filed a motion to dismiss the indictment. As to each of the three counts of the original indictment, Petitioner asserted that at all relevant times to the indictment, he was physically located in the Fort Lauderdale, Florida area. The calls made to him originated in Lawrenceville, Georgia. In such a posture, it was asserted that federal jurisdiction was created by the actions of state and federal law enforcement personnel. Relying upon the authority of Archer v. United States, 486 F.2d 670 (2d Cir. 1973) and United States v. Smith, 749 F.2d 1568 (11th Cir. 1985), Petitioner moved for the dismissal of the indictment on the basis that federal jurisdiction was created by the actions of law enforcement personnel.

The magistrate filed a Report and Recommendation recommending that the indictment be dismissed. The magistrate

noted that "facts in the instant case do not neatly fix any of the authorities cited. The government knew that the defendant, Vernon Howard Barnes, was in Florida and that the telephone calls charged in the indictment were made at the request of the law enforcement officials." The magistrate further noted...

> There is no suggestion that the threatening communication charged in the indictment would have been made had the government not instructed the alleged victims to call the defendant in Florida. The government argues that the defendant made prior threatening telephone calls. However, he is not charged here with any such calls nor is there any evidence that those calls were of an interstate character.

In an apparent response to the magistrate's recommendation, the government presented a superseding indictment to the grand jury. A motion to dismiss the superseding indictment was filed reiterating

the same basis as Petitioner's earlier filed motion to dismiss.

An evidentiary hearing was conducted. The Magistrate filed a second report and recommendation. Inter alia, the recommendation stated...

> The undersigned Magistrate recommends, for the reasons set forth in the original report and recommendation dated February 10, 1987, that Counts 1, 4 and 5 of the superseding indictment be dismissed.

The trial court overruled the magistrate's report and recommendation. The trial court found...

> As in Smith, the government in this case did not "unilaterally supply the interstate element of the offense." Neither the agents nor the victims went out of state for the purpose of making the interstate call and creating the federal jurisdiction, which is the activity the courts have been most concerned to prohibit. See Smith, 749 F.2d at 1569; Garrett, 716 F.2d at 267; Perrin, 580 F.2d at 736. Instead, the agents stayed where the victims were allegedly

being terrorized, and there is no allegation that the victims' location was established to contrive jurisdiction. See Garrett, 716 F.2d at 267; United States v. Bagnariol, 665 F.2d 877, 898 (9th Cir. 1981).

During the evidentiary hearing, Petitioner questioned both Gwinnett County law enforcement personnel who initiated the taping and the alleged victims of the calls.

Detective David B. Holliman is the watch commander for the Gwinnett County Police Department. Pursuant to a request received by one of his officers, Holliman contacted Sherry Schriner in regard to telephone calls she had received from Petitioner. As part of his training, Holliman has been involved in the investigation of state offenses for the use of telephones and the use of threatening phone calls. Offering to contact the telephone company so that a "trace" could be

put on the phone calls, Holliman was concerned about the point of origin of the calls because "at that time there was some speculation that the call was coming from Florida rather than locally". The fact that the phone call originated in Florida was important to the investigation because Holliman recognized that his office would not have jurisdiction of the case if the calls originated in Florida. During the first meeting he head with Mrs. Schriner, Holliman and Ms. Schriner made the November 8, 1986 call which constituted Count One of the superseding indictment. During that initial conference, Holliman told Mrs. Schriner that if she received additional phone calls, that he was to be contacted personally. Schriner was given Holliman's office, home, and pager numbers. Although they discussed the providing of a recording

device for Ms. Schriner, a tape recorder was actually furnished by a special agent of the Federal Bureau of Investigation. The same day that the initial call was recorded, Lieutenant Holliman contacted the Federal Bureau of Investigation.

Holliman gave Ms. Schriner instructions as to how to deal with Petitioner during subsequent telephone conversations. Ms. Schriner was told not to worry about getting off the phone; to stay on the phone and allow Petitioner to say whatever he wished to say. Ms. Schriner was told not to be concerned or fearful and that she was to follow the flow of the conversation and write down her recollections of the conversations. The initial conversation constituting Count One of the indictment was physically recorded at the Gwinnett County Police Station. The call was initiated by

Lieutenant Holliman, and Gwinnett County police equipment was utilized for the recordation. Ms. Schriner was given the following instructions.:

> Q. You tell me if it is not a fair statement, but your advice to her was "if the man calls, don't terminate the conversation --"
>
> A. Yes, sir.
>
> Q. " -- continue to talk -- "..
>
> A. Right.
>
> Q. " -- speak with him, let him say whatever it is that he wants to say," correct?
>
> A. That's correct.

Basically, Holliman instructed Ms. Schriner to not be fearful: "Nothing could happen to you on the phone and we are here to help you."

The lynch-pin opinion of created federal jurisdiction was rendered by the Second Circuit Court of Appeals in United

States v. Archer, 486 F.2d 670 (2nd Cir. 1973). Speaking for the Second Circuit, Judge Friendly set out in great detail the facts concerning an undercover investigation which the court found "went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of state concern". Archer at 672. The defendants in Archer were prosecuted for violations of the Travel Act, [Title 18, United States Code, Section 1952]. The question of three telephone calls formed the hub of the appellate issues in Archer. Confronted with Congressional intent as to what would constitute a violation of Section 1952(a)(3), the Archer court noted...

> Whatever Congress may have meant by Section 1952(a)(3), it certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime.

Archer, supra at 682.

United States v. Archer had been adopted by the Eleventh Circuit. In upholding the conviction in United States v. Perrin, 580 F.2d 730 (5th Cir. 1978), the Former Fifth Circuit looked to the factual context of the use of interstate facilities with the intent to promote a commercial bribery scheme in violation of the Travel Act. In determining whether the government improperly supplied the interstate element in the Perrin prosecution, Judge Thornberry looked first to the fact that this Court could not condemn the fact that a government informer was involved in the interstate element of the crime. Government agents cautioned a key informer "to be a follower and not a leader in the scheme." Perrin at 736. Furthermore, the evidence clearly

reflected that Mr. Perrin actively participated and selected an interstate source of materials and fully appreciated the fact that an interstate connection in the case was necessary for a successful completion on the scheme.

Section 875(c) cannot be used as a basis for a federal prosecution when federal and state law enforcement personnel make a suggestion to "alleged victims" to make an interstate telephone call for the purpose of establishing a federal crime where otherwise no other federal crime would have occurred on those dates. It is without contradiction that it was the Gwinnett County Police [acting in an area in which they knew they lacked jurisdiction] who initiated the first call, recorded the Count One conversation on their own taping equipment and at the direction and supervision of one of their

agents, knowing that the Federal Bureau of Investigation would be immediately contacted to follow up on the case. As to Count Five of the indictment, the transcripts themselves reflect the initiating telephone conversation was arranged in the presence of an F.B.I. agent. The last call, constituting Count Five, although initiated by Petitioner, was the result of Petitioner's returning a message on an answering machine left by Vicki Hales at the suggestion of the agent, when she called from Lawrenceville, Georgia. Absent the initiation of each of those calls by law enforcement personnel, there is no evidence of record that Petitioner would have engaged in interstate telephone communications on the dates in question. The agents clearly understood that Petitioner was not in the Northern District of Georgia, but rather was

out-of-state. It was the interstate call itself which forms the basis of the violation and that call was initiated by the "alleged victims" at the direction and supervision of the agents involved. Under Petit (undecided at the time Petitioner's case was litigated), Petitioner must show entrapment and the cancelling of any element of the offense, such as criminal intent.

Due to the conflict between the Archer and Petit opinions, certiorari review should be granted in this case.

CONGRESSIONAL INTENT

As was adduced during his affirmative case in chief and during cross examination of prosecution witnesses, it was the argument of Petitioner that due to the "family" relationship he had with members of the Shipman family, that the recipients of the telephone calls forming the basis of

Counts One and Five could not have reasonably been expected to construe the communications as threats.

The jury was instructed by the district court that a "statement is a threat within the meaning of this code section if a reasonable recipient familiar with the contents would interpret it as a threat to the person of another. In context, it must have a reasonable tendency to create apprehension, suspicion, or fear that the threat will be acted upon. In other words, it must be a real or serious threat as distinguished from idle or careless talk or mere joking." The jurors were further instructed that they were to consider who originated the call together with all other evidence in the case in deciding whether or not the government proved beyond a reasonable doubt that Petitioner willfully

and knowingly transmitted a threat to injure the person of another.

A review of the relevant case law reflects that prosecutions under Section 875(c) are either infrequently prosecuted or do not often make their way through the appellate process. However, we are guided by the Former Fifth Circuit's opinion in United States v. Bozeman, 495 F.2d 508 (5th Cir. 1974). Mr. Bozeman, a merchant seaman, had an ongoing dispute with the United States Coast Guard. During the pendency of administrative agency appeals, an interstate telephone call was received from Bozeman whereby a threat to kill a Coast Guard officer was clearly stated. In reviewing the communication, the Court found that the unequivocable statement, "I will kill him" constituted a threat within the meaning of Section 875(c):

> [This] communication 'in its context' would 'have a reasonable tendency to create apprehension that its originator will act according to its tenor'.

Bozeman, supra, at 510.

When viewed in their proper context, the communications contained in Counts One and Five could not have had a reasonable tendency to create apprehension that Petitioner would act according to its tenor. Specifically, the calls, [initiated by the "alleged victims"] were made at the request and instigation of state and federal law enforcement personnel so as to provide a basis for a prosecution which otherwise would not have been brought. Instructed as to how to conduct themselves during the investigation [e.g. to allow the conversation to flow and to not be fearful because the police were now involved], the communications were incapable of being

considered as a real threat. Furthermore, it was the assessment of Richard Shipman, communicated to his sisters, that 'Vern is full of hot air' and the family members should not be concerned about the rantings of Petitioner.

A motion for judgment of acquittal was made as to each count at the close of the government's case in chief. Counsel for Petitioner argued that it could not have been the intention of Congress to criminally prohibit the type of communications contained in the indictment.

DUE PROCESS RIGHTS TO FURTHER APPELLATE REVIEW

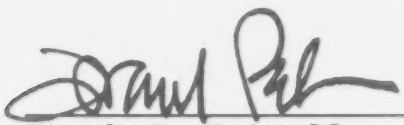
Petitioner was not given a published opinion. Citing Rule 36-1 of the Rules of the Eleventh Circuit Court of Appeals, a per curiam opinion was filed. An unpublished opinion does not allow Petitioner to specify

asserted errors in the decision of the panel and results in further appellate argument based upon speculation and surmise. Such a situation does not comport with fundamental fairness and the due process guarantees of the Fifth Amendment to the United States Constitution.

CONCLUSION

Based upon the foregoing argument and authority, Petitioner prays that certiorari review be granted in the instant matter.

Respectfully submitted,



Frank J. Petrella

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-8739

D.C. Docket No. 86-509

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VERNON HOWARD BARNES,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(September 15, 1988)

Before HATCHETT and CLARK, Circuit Judges, and FITZPATRICK*, District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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*Honorable Duross Fitzpatrick, U. S. District Judge for the Middle District of Georgia, sitting by designation.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-8739

D.C. Docket No. 86-509

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VERNON HOWARD BARNES,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 15, 1988, 11 Cir., 1988 , _____F.2d_____).

(January 3, 1989)

Before HILL AND CLARK, Circuit Judges, and FITZPATRICK,* U.S. District Judge.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

THOMAS A. CLARK
United States Circuit Judge

*Honorable Duross Fitzpatrick, U.S. District Judge for ORD-42 the Middle District of Georgia, sitting by designation.